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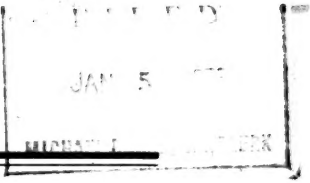

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION, *et al.*,
Petitioner,

v.

JO CAROL La FLEUR, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals is reported in 465 F.2d 1184 (1972). That Court's order denying rehearing (Pet. App. A26-27) is not reported. The opinion of the District Court is reported in 326 F. Supp. 1208 (1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 27, 1972 (Pet. App. A14-25). A motion for a rehearing and suggestion for a hearing *en banc* was denied on August 29, 1972 (Pet. App. A26-27). The petition for a writ of certiorari was filed on November 26, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

Does a Cleveland Board of Education regulation requiring a pregnant teacher to take at least an eight-month leave of absence from her job, without pay and regardless of her ability and desire to continue working, violate the Equal Protection clause of the Fourteenth Amendment?

The District Court answered this question, "No." The Court of Appeals answered, "Yes." Respondents contend the answer of the Court of Appeals is correct and should not be reviewed.

CONSTITUTIONAL PROVISION INVOLVED

U. S. Const. Amend. XIV, Sec. 1

". . . . ; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At the time of the filing of their complaints, Mrs. La Fleur and Mrs. Nelson had both been forced to leave their teaching positions in the Cleveland Public Schools. Mrs.

La Fleur had been placed involuntarily on a maternity leave of absence; Mrs. Nelson had been terminated. Both Plaintiffs asserted jurisdiction of the United States District Court under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4), and their two cases were consolidated by the District Court for hearing.

Shortly prior to hearing the Board of Education conceded that Mrs. Nelson would be placed on maternity leave but pointed out that she would have no right to reinstatement since her teaching contract would expire before she could regain eligibility to return to work under the maternity policy.

At the hearing, Dr. Mark C. Schinnerer, Superintendent of the Cleveland Public Schools twenty years ago when the mandatory maternity rule was first adopted, testified that the rule was devised to prevent children from giggling and laughing at teachers once their pregnant condition became apparent. On this evidence, the District Court found that the primary purpose for the initiation of the rule was protection of the continuity of the classroom program.

Other evidence introduced at hearing by the Board of Education included statistics relating to assaults by students on teachers, numbers of guns and knives confiscated from students, and numbers of teachers injured in school accidents. While this testimony itself was undisputed, its relevance was questioned since the Cleveland School Board was not able to provide a breakdown of its statistics with respect to injuries to or assaults upon pregnant teachers, or even with respect to its female teachers generally.

While the Cleveland Board of Education was permitted to present evidence both of a medical and of a psychological nature by a medical doctor, this evidence was not undisputed as Petitioners contend. A specialist in obstetrics and gynecology with 48 years of medical experience and herself a working mother testified on behalf of the Plaintiffs with respect to the ability of pregnant women to work. Respondents also sought to dispute evidence of a psychological nature testified to by the Petitioner's medical doctor but Respondents' witness, a child psychologist, was not permitted to testify to psychological effects of the mandatory maternity rule.

In reversing the District Court's ruling upholding the Cleveland School Board's mandatory maternity rule, the United States Court of Appeals for the Sixth Circuit considered Dr. Schinnerer's testimony that, if there were no rule, pregnant teachers would be subjected to 'pointing, giggling and . . . snide remarks' by the students. The Court of Appeals rejected embarrassment as a legally sufficient reason for mandating the relinquishment of employment rights. 465 F.2d at page 1187.

The Court of Appeals in its opinion also quoted from the testimony of the Board of Education's own medical expert admitting that he did not always advise his pregnant patients to stop working. The Court then held: "Under no construction of this record can we conclude that the medical evidence presented supports the extended periods of mandatory maternity leave required by the rule both before and after birth of the child." 465 F.2d at 1188.

Petitioners sought a rehearing of the Court of Appeals decision with a suggestion that rehearing be *en banc.* This

motion was denied by the Court of Appeals on August 29, 1972.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied since the decision of the Court of Appeals is in harmony with recent decisions of this Court. In addition, in view of federal legislation and regulations now prohibiting state employers from adopting mandatory maternity leave rules, the question in controversy no longer has the importance that it did when heard by the District Court and argued to the Court of Appeals.

1. The decision below is in harmony with the decision of this Court in *Reed v. Reed* and other recent decisions of this Court.

The Petitioners appear in their brief to have misunderstood both the opinion of this Court in *Reed v. Reed,* 404 U.S. 71 (1971), and the opinion of the Court of Appeals in the present case. By misreading both opinions they have found themselves confronted with a conflict that does not exist.

While in *Reed v. Reed,* this Court adjudged the Idaho statute giving a mandatory preference to men for appointment as administrators of estates to be a violation of the Equal Protection Clause of the Fourteenth Amendment, the Court nowhere rejected the applicability of the strict standard of scrutiny to sex discrimination cases. Indeed, this Court has made clear that it did not need to consider application of the strict standard of review in *Reed v. Reed* since the statute there in question so clearly violated the more lenient "rational relation-

ship" test. *Eisenstadt v. Baird,* 405 U.S. 438, 447 n. 7 (1972).

As the Sixth Circuit Court of Appeals correctly understood, *Reed v. Reed* recognized that establishment of a mandatory preference for men merely to accomplish the elimination of hearings on the merits was "the very kind of arbitrary legislative choice forbidden by the Equal Protection clause of the Fourteenth Amendment". 465 F.2d at 1188, quoting 404 U.S. 71, 76-77. Subsequent to its decision in *Reed v. Reed,* this Court again recognized that use of the more lenient standard of review nevertheless does not permit every classification based on sex to survive judicial review. Dealing with an Illinois statute mandating the presumption that an unwed father was not entitled to the same right to custody of his natural children as was their natural mother during her lifetime, the Court of Appeals below has quoted this Court's statement that:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." 465 F.2d at 1186 quoting from Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 1215 (1972). (Footnotes omitted).

Recognizing that "there is a marked trend of cases to invalidate regulations based on sex classifications unless supported by a valid state interest", the Court of Appeals below also cited numerous decisions of state and lower federal courts invalidating sex-based classifications using the "rational relationship" test. 465 F.2d at 1188-1189.

Given the recent authority of this Court and also the trend of other courts to the same effect, it is not surprising that the Sixth Circuit Court of Appeals, in holding the Petitioner's mandatory maternity policy violative of the Equal Protection guarantee, like this Court earlier in *Reed v. Reed,* did not find it necessary to go beyond an examination of the maternity rule's constitutionality under the lenient standard of review. Despite the contention of the Petitioners to the contrary, the Court of Appeals did not adopt the strict standard of scrutiny in invalidating the Cleveland Board of Education's mandatory maternity rule; there therefore can be no question but that the decision of the Court of Appeals below is perfectly in harmony with prior decisions of this Court.

2. The question in controversy no longer has the importance it had when heard by the District Court and by the Court of Appeals.

When Mrs. La Fleur and Mrs. Nelson filed their complaints in District Court, with the sole exception of 42 U.S.C. § 1983, no federal legislation prohibited state employers from discriminating against their employees on the basis of sex. The Respondents therefore could only invoke the protection of the Fourteenth Amendment of the United States Constitution and undertake the task of demonstrating the classification of the Cleveland Board of Education to bear no reasonable relationship to a legitimate government objective.

In March 1972, Congress amended Title VII of the Civil Rights Act of 1964 extending coverage of the Act to public school teachers. 42 U.S.C. § 2000(e) as amended by P.L. 92-261. New sex discrimination guidelines issued

by the Equal Employment Opportunity Commission (EEOC) which the Petitioners admit are entitled to "great deference" (Pet. Br. p. 8) clearly provide that pregnancy must be treated like any other medical disability thereby prohibiting a mandatory maternity leave period longer than medically required. 29 Code of Fed. Reg. 1064.10(b).

While recognizing that neither the amendments to Title VII nor the new EEOC sex guidelines control the present case, the Court of Appeals pointed out that "they do tend to lessen the reach of our holding." 465 F.2d at 1186. Should this Court reverse the decision of the Court of Appeals, only the legality of subjecting the Respondents to the Board of Education's mandatory maternity policy would be decided; a determination of the legality of the mandatory maternity leave rule as applied to the Respondents' fellow teachers would then be required under Title VII of the Civil Rights Act. The present case therefore no longer holds the same importance that it did when originally filed almost two years ago.

Other cases cited by the Petitioners as conflicting with the Court of Appeals decision in the present case have also suffered a loss of importance since filing. *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *petition for cert. filed* ____ U.S. ____ 41 U.S.L.W. 3157 (U.S. Sept. 21, 1972) (No. 474), a maternity discharge case variously treated by lower courts as a Title VII case and as a Fourteenth Amendment case, would, like the present case, if filed today, clearly fall under Title VII of the Civil Rights Act. 42 U.S.C. §2000(e)(c), CONFERENCE REPORT ON H.R. 1746, EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, Section by Section Analysis, H.R. Rep. No. 1861, 92nd Cong., 2nd Sess, 35 (1972). *Struck v.*

Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971, 1972), vacated and remanded ____ U.S. ____, 41 U.S.L.W. 3346 (Dec. 18, 1972), a Fifth Amendment mandatory discharge case, was vacated by this Court and remanded to the Court of Appeals on December 18, 1972, for a determination of mootness following the decision of the Department of Defense to waive its requirement for discharge of the Petitioner on account of pregnancy.

It is therefore the view of the Respondents that the present case does not achieve sufficient importance to warrant review by this Court.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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